FILED
APR 6 1928
CHARLES ELMORE CROPLEY
CLERK

No. 833 89

In the Supreme Court of the United States.

OCTOBER TERM—1927.

J. ROBERT COGEN,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

In the Matter
of
The Application for the return of certain papers, cards, memoranda and books, and other papers and memoranda seized from the person of the defendant, J. ROBERT COGEN, and for the suppression of all evidence obtained therefrom.

PETITIONER'S REPLY BRIEF.

POINT I.

The Government brief, arguing that the Court below was right, but for the wrong reason, shows the confusion with which this subject is surrounded.

The theory of the Government brief may be correct, which we strenuously deny, but if it is the majority of

the Court below is wrong, and an erroneous rule on an important feature of federal practice has been established in the Second Circuit.

The theory advocated by the Government was adopted by Judge Manton in his concurring opinion, but expressly rejected by a majority of the Court.

This theory is, quoting from page 4 of the Government brief, that:

> "Where an application for the return of seized property and for its suppression as evidence is in substance and effect a proceeding in a pending case, *as distinguished from a proceeding begun by an independent petition*, the order granting or denying the relief prayed is but interlocutory in a pending case and therefore not appealable."

The opinion of Judge Learned Hand reads:

> "This case comes up upon motion in the criminal prosecution then pending, and while *we attach no significance to the way the papers are entitled*, it is plain that *unless the motion lay as an independent proceeding*, it was but a step in the defense and the order is not a 'final decision.'"

Judge Manton in his separate opinion agreed with the Government's present contention,* saying:

> "The application for their return as unlawful in violation of the constitutional rights of this plaintiff in error was prosecuted as an incident to the pending criminal proceedings. If it were an independent proceeding, the order is final and appealable."

*The case was argued for the Government on a different basis in the Court below.

The distinction is highly important. If the Government and Judge Manton are right, persons deprived of property are entitled to appellate review if they proceed in the right way, even if indictment is pending and no court writ involved.

a. Different Treatment of the *Essgee* case.

This distinction is strikingly illustrated by the different ways in which Judge Hand and the Government treat *Essgee Co.* v. *United States*, 262 U. S. 151. As explained in our main brief, in this case a Grand Jury subpoena *duces tecum* had been served on the Essgee Company. No one appeared before the Grand Jury but an officer of the corporation left papers in a room in the Courthouse, where the District Attorney found them. Months later the corporation was indicted and then petitioned for a return of the papers. The petition was not directed at the subpoena, but in the petition the claim was made that the subpoena was invalid. The order in the case was reviewed by this Court on appeal.

Now, Judge Hand, distinguishes the *Essgee* case from the present on the ground that it was an order disposing of a court writ, we believe we have already shown that Judge Hand was wrong on his facts in making this distinction; apparently the Government thinks little of this theory, but relies upon the difference in procedure. We quote below the varying treatments of the *Essgee* case in parallel columns:

Government Brief (page 9, Brief):	Judge Hand (page 33, Opinion, C. C. A.):
"In *Essgee Co.* v. *United States*, the petitions for the	"In *Essgee Company* v. *U. S.*, 262 U. S. 151, an

return of books and papers were filed after indictments had been returned against petitioners. The petitions were not entitled as in the criminal cases, however, but were plainly intended by the petitioners and treated by the court as the beginning of new and independent proceedings. The orders denying the petitions were, therefore, obviously final and reviewable in this Court."

order was reviewed which after indictment denied the return of papers produced in compliance with a subpoena *duces tecum* issued by the Grand Jury. The point was again assumed without discussion, and the case is in any event to be distinguished in that the motion was a determination of a proceeding commenced by the court's writ. In this regard it was like a search warrant, though issuing as of course. No doubt a court has always supervision over the execution of its writs, *Wise v. Henkel*, 220 U. S. 556, 558, and its orders may perhaps be treated as final which dispose of them."

In the Government Brief (p. 11) it is claimed that no question of jurisdiction was raised in the *Essgee* case. This is erroneous as the first point raised by the Solicitor-General was that the order was interlocutory and not reviewable.

b. Different Treatment of the *Steele* case; but both the Government and Judge Hand wrong on the facts

The *Steele* case is also distinguished on different grounds; Judge Hand on the court writ theory, the

Government on the independent petition theory. As pointed out in our main brief we believe Judge Hand entirely wrong on his facts in his differentiation of the *Steele* case—the order was *not* made on the return of the executing officer to the judge or commissioner allowing the writ.

The Government is also wrong on its facts, but on different facts. The application in the *Steele* case was made on affidavits in the same manner that this case was. The moving paper appears on page 4 of the Record in this Court. It is called "Notice of Motion" and reads as follows: "Upon the annexed petition* of Meyer Kraushaar, verified the 30th day of October, 1923, and upon the affidavit of Isidor Einstein, etc. * * * the undersigned will *move this Court** * * * on the fifth day of November, 1923 * * * for an order" granting the relief prayed, and is addressed to the United States Attorney and Commissioner Hitchcock.

The proceeding was certainly not an appellate one; it was a motion on affidavits and deposition, for the return of property. We must therefore respectfully ask the Court to read page 10 of the Government Brief in connection with what has been said here.

c. Different Results reached in Applying theories of Government and of the Court below.

According to the Government and Judge Manton the following orders are final:

Orders made in entirely separate equitable cases, ir-

*Although called a petition it is in affidavit form, annexed to the notice of motion and certainly is not a pleading in Steele's name.

*The motion was, furthermore, returnable in the Courtroom for criminal motions, not the one for civil motions.

respective of court writs involved, or the pendency of indictments.

According to the majority of the Court below the following are final:

Orders in independent equitable actions, *where no indictment is pending.*

Orders made on motion or in entirely separate equitable cases, if involving a court writ.

But orders made in separate equitable cases are interlocutory if no court writ is involved and an indictment is pending.

POINT II.

The Government has overlooked the *Segurola* case and its doctrine.

We have taken up *Segurola* v. *United States*, not yet reported, at some length in our main brief but the Government has not seen fit to mention it.

On pages 7, 8 and 9 of our main brief we discussed some of the leading cases in which orders in pending cases were held reviewable, and pointed out how this Court's definition of the issue involved an application for the return of seized property exactly match definitions of issues, the orders settling which were held final and reviewable.

The contrast between the attitude of the *Segurola* case and that of the Government brief is shown, we believe by comparing the following quotations:

Government Brief (pp. 8-9 Brief):	This Court:
"Petitioner cites *Trustees* v. *Greenough*, 105	"The Court will not in trying a criminal cause

U. S. 527; *United States* v. *River Rouge Co.*, 269 U. S. 411, and other cases, as instances in which orders rendered in pending cases were held subject to review. In those cases, however, the particular matter decided was *plainly severable* from the other issues in litigation, whereas in the instant case the motion denied by the District Court would, if granted, prevent the use of evidence without which it would be useless to proceed."

permit a *collateral* issue to be raised as to the source of competent evidence. To pursue it would be to halt in the orderly progress of a cause and consider *incidentally* a question which happened to cross the path of such litigation and which is *wholly independent* of it."

What is the distinction between "wholly independent" and "plainly severable"?

And this Court says that in the *Segurola* case "the defendants should have *moved*" for a return of the seized property.

POINT III.

The whole point of the *Segurola* case will be lost if the Government's contention is upheld.

On page 11 of the Government brief it is pointed out that if petitioner is right, and the order is final, "all questions involving the validity of the seizure would be *res adjudicata* and could not again be passed on by the court in considering objections at the trial."

This is exactly what we contend, and we think it is necessarily involved in the decision in the *Segurola* case.

The Court in that case, if we understand it correctly, intended to prevent the disturbance of the progress of criminal trials by long inquiries into the competency of evidence offered. Clearly such disturbance can only be prevented if the question has been finally settled. We do not regard, as the Government seems to, a preliminary application as a sort of ritual to be gone through with if one is to be in a position to object to evidence at the trial, and then go through the whole thing over again, yet that is the only basis upon which the Government's theory that these orders are not final can be reconciled with the firm requirement of this Court that a preliminary application be made.

For instance, if the order in this case is not final then the whole question will have to be gone into at the trial, and evidence taken on the issue of probable cause,* if petitioner's rights are to be protected. This is clearly inconsistent with the theory of the *Segurola* case, and as we observed in our main brief (pp. 21-22) that case, in connection with the decision below, if unreversed, makes it difficult to see how this petitioner's rights can be protected.

The following language of this Court in the *Steele* case supports our theory:

> "It should first be said that *Steele* is not in a position to raise this question. He might have raised it in the preceding case, but he did not do so, and did not assign error on account of it in his appeal to this Court. *The refusal to vacate the*

*Counsel was present at a criminal trial in the District Court of the United States for the Southern District of New York when the Court spent a whole day inquiring into the source of evidence, based it supposed, by the *Amos* case.

Search Warrant and to return the liquor seized was a final decree. The question is therefore res adjudicata as against him."

The want of uniformity that would exist if the decision below stands is, certainly, highly undesirable.

POINT IV.

The Court below, the Court of Appeals of the Sixth Circuit, and the Solicitor-General's office all disagree on point here involved.

If, contrary to our contention, the Government is right, the Court below is wrong in one respect; and the Court of Appeals of the Sixth Circuit (*Dowling* case) doubly wrong. And on any basis, as the Government concedes, the Court below is in disagreement with the Sixth Circuit on important feature of federal practice, and the Government in disagreement with both.

Respectfully submitted,

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